MUHAMMAD SHAFEE MD ABDULLAH v. PEGUAM NEGARA/PENDAKWA RAYA MALAYSIA & ORS AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
MARIANA YAHYA J
[JUDICIAL REVIEWS NO: WA-25-377-12-2018 & WA-25-393-12-2018]
28 AUGUST 2020

CIVIL PROCEDURE: *Judicial review – Application for – Attorney-General ('AG'), in capacity as Public Prosecutor ('PP'), appointed advocate and solicitor as Senior Deputy Public Prosecutor – Appointment made pursuant to s. 376(3) of Criminal Procedure Code – Application to quash AG/PP's decision in appointing advocate to lead prosecution of criminal charges against applicants – Whether AG/PP acted outside constitutional or statutory powers – Whether decision to appoint advocate legal and valid*

CRIMINAL PROCEDURE: *Public Prosecutor – Powers and functions – Attorney-General ('AG'), in capacity as Public Prosecutor ('PP'), appointed advocate and solicitor as Senior Deputy Public Prosecutor – Appointment made pursuant to s. 376(3) of Criminal Procedure Code – Advocate attended on behalf of AG/PP as lead prosecutor in criminal proceedings – Whether appointment valid and legal – Whether advocate 'fit and proper persons' within meaning of s. 376(3) – Whether AG/PP's power to appoint 'fit and proper persons' as full-time DPP/Senior DPP could only be exercised to employ person into full-time employment as public servant of Government and/or member of public service – Whether appointment ought to have been made under s. 379 of Criminal Procedure Code*

The Attorney-General/Public Prosecutor ('AG/PP') had appointed Datuk Seri Gopal Seri Ram ('DSGSR') as the Senior Deputy Public Prosecutor ('Senior DPP') to lead the prosecution of the criminal charges against (i) Dato' Seri Mohd Najib Hj Abd Razak, who was charged under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 and s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001; and (ii) Tan Sri Muhammad Shafee Abdullah, who was facing charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 ('AG/PP's decision'). Aggrieved, Dato' Seri Mohd Najib Hj Abd Razak and Tan Sri Muhammad Shafee Abdullah ('applicants') commenced the present applications for judicial review against the respondents, namely the AG/PP, the Government of Malaysia and DSGSR, seeking to, *inter alia*, quash the AG/PP's decision. In support of their applications, the applicants submitted that, *inter alia*, (i) the power conferred upon the AG/PP, to appoint 'fit and proper persons' as a full time DPP/Senior DPP, could only be exercised by the AG/PP to employ a person into

full-time employment as a public servant of the Government and/or member of the public service, namely the Judicial and Legal Service; and (ii) since DSGSR was an advocate, the right and proper provision that enabled the AG/PP to appoint him was provided under s. 379 of the CPC. The issues that arose for adjudication were (i) whether the appointment of DSGSR was *ultra vires* the law and illegal; and (ii) whether DSGSR was a 'fit and proper person', within the meaning of s. 376(3) of the Criminal Procedure Code ('CPC'), when he was appointed as the Senior DPP.

Held (dismissing applications):

(1) Under s. 376(3) of the CPC, two requirements must be met for the appointment of the DPP/Senior DPP to be valid under the law. Firstly, the appointment must be made by the proper appointing authority, namely the AG/PP. Secondly, the appointed person must be a 'fit and proper persons' in the eyes or opinion of the AG/PP. There is nothing in s. 376(3) of the CPC that provides that (i) in order for 'fit and proper person' to be a DPP, he/she must come from the Judicial and Legal Service; and (ii) the appointment of a Senior DPP is on a full-time/part-time basis. Moreover, s. 379 of the CPC talks about the employment of an advocate on behalf of the Government to conduct any criminal prosecution or inquiry, or to appear on any criminal appeal or on point of law reserved on behalf of the AG/PP. The advocate who conducts such prosecution or inquiry 'shall be deemed to be a public servant'. On the other hand, DSGSR was appointed by virtue of s. 376(3) of the CPC and not just being employed *per se*. The AG/PP had made the appointment of DSGSR as a Senior DPP under the statutory powers conferred on him. (paras 23, 27, 30 & 31)

(2) Under s. 376(4) of the CPC, the AG/PP has the rights and powers personally in determining a 'fit and proper persons' to be a DPP. The term 'fit and proper persons' under s. 376(3) of the CPC should not be read in isolation without cross-referring to s. 376(4). When read together, the provisions connote that only the AG/PP could determine who falls under the category of 'fit and proper persons' upon his personal consideration and it is not the court's duty to do so. The AG/PP was satisfied that DSGSR was a 'fit and proper person' within the meaning of s. 376(3) of the CPC at the time of his appointment. (paras 33 & 34)

(3) The AG/PP had not acted outside his constitutional or statutory powers. The decision to appoint DSGSR as the Senior DPP was not a nullity, void or of no effect; nor did the decision defy the statute. There was no evidence that the AG/PP had misdirected himself, in law, in the appointment of DSGSR under s. 376(3) of the CPC. Therefore, the appointment of DSGSR as the Senior DPP was legal and valid. (paras 42-44)

Case(s) referred to:
Bunya Jalong v. PP [2015] 5 CLJ 893 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2014] 5 CLJ 679 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***
K Anbazhagan v. State of Karnataka [2015] 6 SCC 158 ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***
PP v. Dato' Sri Anwar Ibrahim [2014] 1 CLJ 354 CA ***(refd)***
R Balakrishna Pillai v. State of Kerala 1999 Cri LJ 1286 ***(refd)***
State (Delhi Admin) v. Dharam Pal 1982 Cr LJ 1103 ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)
Criminal Procedure Code, ss. 68(2), 376(1), (3), (4), 377(a), (b)(1), 379
Federal Constitution, arts. 142, 145(3)
Malaysian Anti-Corruption Commission Act 2009, s. 23

(Judicial Review No: WA-25-377-12-2018)
For the applicants - Harvinderjit Singh, Muhammad Farhan Shafee, Sarah Maalini Abishegam, Wee Yeong Kang & Syahirah Hanapiah; M/s Shafee & Co
For the respondents - Shamsul Bolhassan & Liew Horng Bin; SFCs

(Judicial Review No: WA-25-393-12-2018)
For the applicants - Muhammad Shafee Abdullah, Muhammad Farhan Shafee, Sarah Maalini Abishegam, Wee Yeong Kang & Syahirah Hanapiah; M/s Shafee & Co
For the respondents - Shamsul Bolhassan & Liew Horng Bin; SFCs

Reported by Najib Tamby

JUDGMENT

Mariana Yahya J:

Introduction

[1] In the Case No. WA-25-377-12-2018 (hereinafter referred as "Case 377"), the applicant/Tan Sri Muhammad Shafee bin Md Abdullah (hereinafter referred as "TS Shafee") sought for the following reliefs:

(i) an order of *certiorari* to quash and/or set aside the decision of the first respondent to not produce and/or disclose to the applicant a copy of the letter of appointment in relation to the appointment of the third respondent as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code (hereinafter referred as "the decision");

(ii) an order of *mandamus* or otherwise that the respondents do forthwith produce and/or disclose to the applicant a copy of the letter of appointment executed by the first respondent in relation to the appointment of the third respondent as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code;

(iii) a declaration that the first respondent's appointment of the third respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise is *ultra vires* and/or in excess of the statutory powers of the first respondent and is therefore a nullity, void and/or of no effect;

(iv) an order of *certiorari* to quash and/or set aside the first respondent's appointment of the third respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise;

(v) a declaration that there is a conflict of interest between the appointment of the third respondent as a Senior Deputy Public Prosecutor under s. 376(3) of the Criminal Procedure Code and his continuous practice as an advocate and solicitor of the High Court of Malaya;

(vi) a declaration that the third respondent has acted and/or continues to act in conflict of interest of his purported appointment as a Senior Deputy Public Prosecutor;

(vii) a declaration that the third respondent is not a "fit and proper person" to have been appointed as a Senior Deputy Public Prosecutor pursuant to s. 376(3) of the Criminal Procedure Code;

(viii) an order that the third respondent be restrained and/or prohibited from continuing to act as a Senior Deputy Public Prosecutor and/or to appear on behalf of the first respondent in Kuala Lumpur High Court Case No. WA-45-6-10-2018; *PP v. Muhammad Shafee bin Md Abdullah*;

(ix) an order that the first respondent be restrained and/or prohibited from further authorising the third respondent to continue acting as a Senior Deputy Public Prosecutor and/or to appear on behalf of the first respondent in Kuala Lumpur High Court Case No. WA-45-6-10-2018; *PP v. Muhammad Shafee bin Md Abdullah*;

(x) costs; and

(xi) such necessary and/or consequential and/or further and/or other orders, reliefs and/or directions which this Honourable Court may deem fit and proper in the circumstances.

[2] Meanwhile, in the Case No. WA-25-393-12-2018 (hereinafter referred as "Case 393"), the applicant/Dato' Sri Mohd Najib bin Hj Abd Razak (hereinafter referred as "DS Najib") sought for the following reliefs:

(i) an order of *certiorari* to quash and/or set aside the decision of the first respondent to not produce and/or disclose to the applicant a copy of the letter of appointment in relation to the appointment of the third respondent as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code (hereinafter referred as "the decision");

(ii) an order that the respondents do forthwith produce and/or disclose to the applicant a copy of the letter of appointment executed by the first respondent in relation to the appointment of the third respondent as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code;

(iii) a declaration that the first respondent's appointment of the third respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise is *ultra vires* and/or in excess of the statutory powers of the first respondent and is therefore a nullity, void and/or of no effect;

(iv) an order of *certiorari* to quash and/or set aside the first respondent's appointment of the third respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise;

(v) a declaration that there is a conflict of interest between the appointment of the third respondent as a Senior Deputy Public Prosecutor under s. 376(3) of the Criminal Procedure Code and his continuous practice as an advocate and solicitor of the High Court of Malaya;

(vi) a declaration that the third respondent has acted and/or continues to act in conflict of interest of his purported appointment as a Senior Deputy Public Prosecutor;

(vii) a declaration that the third respondent is not a "fit and proper person" to have been appointed as a Senior Deputy Public Prosecutor pursuant to s. 376(3) of the Criminal Procedure Code;

(viii) an order that the third respondent be restrained and/or prohibited from continuing to act as a Senior Deputy Public Prosecutor and/or to appear on behalf of the first respondent in Kuala Lumpur High Court Case No. WA-45-6-10-2018; *PP v. Muhammad Shafee Abdullah*;

(ix) an order that the first respondent be restrained and/or prohibited from further authorising the third respondent to continue acting as a Senior Deputy Public Prosecutor and/or to appear on behalf of the first

respondent in Kuala Lumpur High Court Case No. WA-45-7-11-2018, Kuala Lumpur High Court Case No. WA-45-8-11-2018, Kuala Lumpur Sessions Court Arrest Case No. WA-61R-21-10-2018 and Kuala Lumpur Sessions Court Arrest Case No. WA-61R-26-12-2018 and/or the proceedings at the Kuala Lumpur High Court as transferred;

(x) costs; and

(xi) such necessary and/or consequential and/or further and/or other orders, reliefs and/or directions which this Honourable Court may deem fit and proper in the circumstances.

[3] These cases are inter-related with each other as both cases involve identical issues and the same respondents. The applicants in both cases filed judicial review applications amongst others to quash the first respondent's decision in appointing the third respondent/Datuk Seri Gopal Sri Ram as a Senior Deputy Public Prosecutor purportedly pursuant to s. 376(3) of Criminal Procedure Code (hereinafter referred as "CPC") to lead the prosecution of criminal charges preferred against the applicants. Both cases were registered and fixed before this court. There was no order for both cases to be heard together. However, for convenient purposes, it was agreed by both parties that both cases to be heard together since the issues to be argued were identical.

[4] On 20 February 2019, the court dismissed the leave application for judicial review in both cases after hearing the preliminary objection raised by the respondents on the grounds that the same applications were filed and pending at the criminal courts and that it is more convenient for this issue to be dealt by the criminal courts as the main trial is in the criminal courts. Upon appeal to the Court of Appeal, the Court of Appeal had on 26 August 2019 allowed both applicants' appeals and ordered both cases to be remitted to High Court to hear the substantive applications. Therefore, these cases are now fixed for hearing of substantive applications before this court.

[5] At the hearing of the said appeals before the Court of Appeal, the applicants' counsels had taken their stand on the issues that to be determined at the substantive stage of these judicial review proceedings as follows:

(i) whether s. 376(3) of the CPC read in light of existing provisions of relevant laws allows the first respondent as Public Prosecutor to appoint a part-time Public Prosecutor to maintain private practice;

(ii) whether the first respondent's power to engage a practicing advocate and solicitor is limited to s. 377 and s. 379 of the CPC; and

(iii) whether the first respondent in appointing the third respondent as for the terms of appointment has acted beyond the ambit of his powers under s. 376(3) of the CPC.

[6] It is pertinent to note here that the learned High Court Judge in the criminal proceedings dismissed the motion for the disqualification of the third respondent. That decision was affirmed by the Court of Appeal. The applicants then appealed to the Federal Court whereby the Federal Court had on 7 August 2019 affirmed the decision of the Court of Appeal on the issue of disqualification. The Federal Court allowed the appeal in part and ordered the Public Prosecutor to produce a copy of the letter of appointment and a copy to be given to the counsels of the applicants. The same was produced on 9 August 2019.

Salient Facts

[7] DS Najib is the former Prime Minister of Malaysia, the former President of the United Malays National Organisation (hereinafter referred as "UMNO") and the former President of the Barisan Nasional coalition (hereinafter referred as "BN") whilst TS Shafee is DS Najib's legal counsel at the material times who is practising under the name and style of Messrs Shafee & Co. The first respondent is the Attorney General/Public Prosecutor of Malaysia (hereinafter referred as "AG/PP") whilst the second respondent is the Government of Malaysia. The third respondent/Datuk Seri Gopal Sri Ram (hereinafter referred as "GSR") is an advocate and solicitor of Malaya who's currently practicing in the firm of Messrs Sri Ram.

[8] The crux of the dispute between the parties is pertaining to the appointment of GSR as a Senior Deputy Public Prosecutor (hereinafter referred as "SDPP") under the appointment and authority of the AG/PP, which appointment and authority is the subject matter of challenge herein.

[9] The applicants contended that after the change of Government took place by virtue of the 14th General Elections, the political rivals of DS Najib who are now in the Government have commenced a politically charged campaign against DS Najib and other members of the former Government.

[10] *Vide* a "media release" dated 31 August 2018 published by the AG/PP, AG/PP had broadcasted amongst others that GSR is appointed as SDPP pursuant to s. 376(3) of the CPC. Less than two weeks after the issuance of the media release, on 13 September 2018, criminal proceedings were commenced against TS Shafee.

[11] The applicants claimed that they have from 20 September 2018 and continuing to date, been adversely affected by the purported exercise of the powers of the AG/PP in appointing GSR as a SDPP.

[12] GSR who purported to act as a SDPP under the purported authority granted to him by the AG/PP, attended on behalf of the AG/PP as "lead prosecutor" in the applicants' cases (DS Najib was charged under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 and under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of

A Unlawful Activities Act 2001 ie, the SRC case and the 1MDB case whilst TS Shafee was charged with two charges under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 as well as two charges under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001).

B **Findings Of Court**

[13] The law on judicial review is well settled that the court may review a decision in the exercise of the public duty or function on the grounds of illegality, irrationality and procedural impropriety. In the recent case of *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561, C the Federal Court stated as follows:

> [60] This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p. 401D of the *GCHQ* case enunciated three classic grounds for judicial review:
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> D
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> > Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety." ...
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> E
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> > By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the
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> F judicial power of the state is exercisable.
>
> > By 'irrationality' I mean what can now succinctly be referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in it defiance of logic or of accepted moral standards that no reasonable person who had
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> G applied his mind to the question to be decided could have arrived at it.
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> > I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the
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> H decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> I ...

[81] Before concluding the present appeals, we would like to reiterate the important pronouncement in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561. In this case, the Federal Court emphatically declared that the power of judicial review "cannot be changed or altered by Parliament by way of a constitutional amendment". The court further stated, "The power of judicial review is essential to the constitutional role of the courts, and inherent in basic structure of the constitution". The Federal Court's reassertion of constitutional judicial power and its status as superior court meant that the power of the AG to grant or refuse consent under s. 9(1) of Act 359 is amenable to judicial review.

[14] In the case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said at p. 148:

Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts LJ in *Bradbury v. London Borough of Enfield...*).

[15] Based on the authorities cited above, it is clear that this court has the power to hear the issue of justiciability of GSR's appointment in the substantive stage hearing of these judicial review applications. The nature and jurisdiction of these judicial review applications and the disqualification motion before the criminal court are clearly separate and distinct. The former is a public law remedy to challenge the legality of the AG/PP's appointment of GSR. On the other hand, the latter is a private law remedy to seek GSR to be disqualified on grounds of conflict, bias and unfairness. Therefore, these present judicial review applications confined to the legality of the AG/PP's decision.

[16] It is the applicants' case that the decision to appoint GSR as a SDPP with conduct over the applicants' case was *ultra vires* the powers of the AG/PP conferred under the CPC and that the said decision ought to be quashed as GSR is in clear conflict of interest. It is also the applicants' position that:

(i) They are not disputing the existence of the letter of appointment (hereinafter referred as "LOA") but objecting to the appointment of GSR as a SDPP.

(ii) The applicants also concurred that both applications for judicial review do not deal with the powers of the AG/PP to institute, conduct or discontinue criminal proceedings under art. 145(3) of the Federal Constitution.

[17] Looking at the issues raised by the applicants in these cases, this court is of the view that the main issue to be determined in these judicial review applications is focused on the legality, validity and appropriateness of the appointment of GSR as a SDPP by the AG/PP.

Whether The Appointment Of GSR Is *Ultra Vires* The Law And Illegal

[18] On this point, the applicants contended that the appointment of GSR as a SDPP under s. 376(3) of the CPC is wrong in law, *ultra vires* and illegal on following grounds:

(i) section 376(3) of the CPC only confers power to the AG/PP to appoint "fit and proper persons" as a full-time DPP or SDPP;

(ii) the said power can only be exercised by the AG/PP to appoint a person into full-time employment as a public servant of the second respondent and/or member of the public service namely the judicial and legal services;

(iii) the above power is separate and distinct from the power of the AG/PP to appoint and employ a practising advocate to have conduct of prosecutions in court;

(iv) the power of the AG/PP to appoint or employ a practicing advocate to have conduct of prosecutions is limited to an *ad hoc* appointment on a case to case basis and is subject to the production of "permission in writing" of the AG/PP (traditionally known as "Fiat");

(v) GSR was at all material times engaged in private practice as a full-time advocate and solicitor of the High Court of Malaya and practices in the firm of Messrs Sri Ram;

(vi) at the same time, GSR is now purporting to act as a full-time SDPP with direction and supervision over past and ongoing investigations of investigating agencies and with conduct of prosecutions for an indeterminate number of criminal proceedings in court;

(vii) the AG/PP does not have the power to employ and appoint GSR as a DPP as aforesaid whilst GSR at all times continued full-time private practice as an advocate and solicitor;

(viii) GSR's alleged appointment under s. 376(3) of the CPC has not even been gazetted in the Federal Government *Gazette*;

(ix) section 376 of the CPC is an appointment section. Section 376 of the CPC primarily is the appointment of public servants who belong to the judicial and legal services. They must be public servants and therefore, art. 142 of the Federal Constitution comes into action;

(x) GSR is not from the judicial and legal services and therefore he is not a public servant. Thus, the appointment under s. 376(3) of the CPC is wrong in law;

(xi) GSR is an advocate and the right and proper provision that the AG/PP can appoint him is under s. 379 of the CPC;

(xii) the terms in the LOA are unreasonable, irrational and procedurally wrong. The terms and conditions in Appendix A clearly show that the appointment of GSR as a SDPP is permanent. GSR as an advocate cannot be a part-time DPP where at the same time he is also acted as counsel in other cases which are against the Government; and

(xiii) GSR as a SDPP was given the tasks to investigate, draft the charges and to prosecute the accused in court. As a SDPP who actively involves in the investigation, he shall not prosecute at the same time and it is a total conflict of interest.

[19] The applicants further argued that there are times when the appointment of *ad hoc* lawyers for purposes of employment as advocate or as prosecutor, although strictly under s. 379 of the CPC, but sometimes, the AG/PP had used provision of s. 376(3) of the CPC read together with s. 379 CPC, namely the appointment power emanates from s. 376(3) of the CPC, but the actual provision for the appointment of the person is under s. 379 of the CPC. Section 377 of the CPC is the allowing provision, is a declaration by Legislature that prosecution can only be conducted by the following person authorised in writing by the AG/PP. In addition, s. 379 of the CPC also provides payments, remuneration to the advocate acting on behalf of the AG/PP. In other words, the category appointment comes under s. 376(3) of the CPC but the specific appointment when an advocate is involved is s. 379 and not s. 376(3) of the CPC.

[20] Learned counsels for the applicants also submitted that even though the general appointment is made under s. 376(3) of the CPC, but when an advocate is involved, then a specific appointment must be made/read together with s. 379 of the CPC which is not done by the AG/PP here. Therefore, the appointment must be made under the specific provision rather than the general provision, ie, s. 379 of the CPC which is in line with the legal maxim of "*generalia specialibus non derogant*".

[21] In replying to the contentions raised by the applicants, the respondents rebutted as follows:

(i) the appointment of GSR as a SDPP was made by the AG who, by virtue of s. 376(1) of the CPC is the PP;

(ii) the PP is vested with the power pursuant to s. 376(3) of the CPC to appoint a DPP and he may designate any of such DPP as a SDPP;

(iii) section 376(4) of the CPC further states that the powers exercisable by the PP in sub-s. 376(3) of the CPC shall be exercised by him personally;

(iv) the appointment of GSR as a SDPP by the AG/PP was made known through a media release issued by the AG/PP dated 31 August 2018. This media release was exhibited as "MSA1" and "DSN2" in the applicants' affidavit-in-support;

(v) it is obvious from the excerpt of the said media release that the appointment of GSR as a SDPP was made under the provisions of s. 376(3) of the CPC and such appointment was made by the AG/PP personally;

(vi) section 376(3) of the CPC is the adjectival vehicle through which the AG/PP under art. 145(3) of the Federal Constitution exercises his prosecutorial prerogative in relation to the conduct of a criminal prosecution;

(vii) the language of s. 376(3) of the CPC is broad and permissive of the appointment of GSR as a SDPP. Section 376(3) of the CPC does not expressly limit the potential SDPP from only among the legal officers serving under the judicial and legal services;

(viii) likewise, s. 376(3) of the CPC does not impose as a condition any such appointment of a SDPP shall be on a full-time basis. When the language of the enabling provision under s. 376(3) of the CPC is couched in a broad and permissive manner, there is no cogent reason to read into s. 376(3) of the CPC extra requirements, limitations or words which are not there;

(ix) unlike the express requirement dictated in s. 377 for *Gazette* notification of a police officer below the rank of Inspector as the prosecuting officer, there is no express requirement under s. 376(3) of the CPC that the appointment of an SDPP must be gazetted for such appointment to take effect;

(x) in any event, for all intents and purposes, the appointment of GSR as a SDPP by the AG/PP was widely made known through the media release issued by the AG/PP dated 31 August 2018. Neither TS Shafee nor DS Najib was claiming lack of knowledge of the said appointment;

(xi) if all that is required of an advocate to be employed on behalf of the Government to conduct any criminal prosecution is merely a permission in writing of the AG/PP as spelt out in s. 377(b) and s. 379 of the CPC, then there is much stronger force to say that if one were to read s. 376(3), 377(a) and (b)(1), and s. 379 of the CPC together, the cumulative effect of a contextual reading of the relevant provisions supports the conclusion that there is nothing objectionable for a senior advocate, such as GSR, to be appointed as a SDPP under s. 376(3) of the CPC as evinced by the LOA issued by the AG/PP;

(xii) the intention to retain GSR as a SDPP by the AG/PP is clear beyond doubt. Any doubt as to want of authority on the part of GSR to conduct criminal prosecution as a SDPP has more than sufficiently dispelled by the presence of the AG/PP in the proceedings confirming the very appointment of GSR. Any SDPP or DPP is only assistant to the AG/PP in a case which the latter appears;

(xiii) if all that is required of an advocate to be employed on behalf of the Government to conduct any criminal prosecution is merely a permission in writing of the AG/PP, then the LOA itself is a clear manifestation of a "permission in writing" of the AG/PP;

(xiv) the Government, like any private party, can choose and appoint or authorise any advocate to appear on their behalf in any court of law. It is not open to an accused in the case to challenge on some trivial technical ground the appointment of an advocate when the intention of the appointing authority is clear and the language of s. 376(3) of the CPC is broad and permissive of the appointment of GSR as an SDPP;

(xv) it is a sheer intellectual waste to engage in hair splitting argument on the legality of GSR appointment under s. 376(3) of the CPC;

(xvi) on a challenge on the validity of the appointment of an *ad hoc* Prosecutor, in the present case, there is no challenge to the legal authority of GSR as an SDPP by the Government or by someone claiming that position *de jure*. Instead, the Government, through the AG/PP, has reiterated and maintained the legal authority of GSR as having been validly appointed under s. 376(3) of the CPC;

(xvii) this is consistent with the trite law that non-appointment of a DPP or defect in the appointment of an *ad hoc* DPP does not invalidate the trial. Any defect in the appointment is curable since "the court has sufficient authority in such cases to use its inherent powers or revisional powers even *suo moto*" (see *State (Delhi Admin) v. Dharam Pal* 1982 Cr LJ 1103 at pp. 1104 to 1105);

(xviii) even when the appointment of an *ad hoc* DPP was annulled on ground of without valid authorisation from the appointing prosecutor, that in itself was held by the Indian Supreme Court to be no justification to direct *de novo* hearing. Instead, it was held that regards must be had to the delivery of a just and objective decision by the High Court, considering the gravity of the offence especially when the trial has proceeded at length (see *K Anbazhagan v. State of Karnataka* [2015] 6 SCC 158 at paras. 36 to 40);

(xix) the appointment of GSR as a SDPP pursuant to s. 376(3) of the CPC by the AG/PP is valid. The AG/PP has not acted outside his constitutional or statutory powers and therefore the appointment is not assailable;

(xx) the doctrine of separation of powers dictates that a court of law should be slow to interfere with the exercise of the constitutional prerogative in the context of appointment of advocate as DPP by the AG/PP;

(xxi) locally, there is a consistent judicial trend where courts generally deferred to the choice of counsel appointed by the AG/PP to act on behalf of the Government. The Court of Appeal at para. 49 of its judgment in DS Najib's appeal against the dismissal of his criminal disqualification motion in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] MLJU 529 has vouched for the same approached as previously endorsed by the very same court in the case of *Dato' Seri Anwar Ibrahim v. PP* [2014] 5 CLJ 679; [2014] MLJU 1876 at para. 15 that "the appointment of an advocate as DPP was at the sole discretion of the PP and no other body including the Bar Council could usurp that prerogative vested in the PP"; and

(xxii) thus, the same attitude of deference to the judgment of the PP in the exercise of his constitutional prerogative should apply in the present case.

[22] In determining this issue, the court refers to the LOA dated 30 August 2018 and reproduced as below:

Letter of Appointment dated 30.8.2018

RAHSIA

Our ref: PN(R)152/6005/56

Datuk Seri Gopal Sri Ram
Wisma Selangor Dredging
Letter Box No.7, East Block, Level 5
142-B, Jalan Ampang
50450 KUALA LUMPUR

Date: 30th August 2018

BY HAND

Dear Sri Ram:

Re: 1 MDB Prosecution

In the exercise of my discretion under Section 376(3) of the Criminal Procedure Code, I am pleased to appoint you as Senior Deputy Public Prosecutor to spearhead the investigation of numerous fraudulent deals connected with the affairs of the 1 Malaysia Development Berhad ("1MDB") group of companies and the prosecution of the principal personalities responsible for such massive fraud. Your service would include:

(i) Working with the relevant investigation Agencies with a view of urgently securing investigation papers ("IPs") from them;

(ii) Studying all IPs that will be submitted by the various investigating Agencies to Chambers;

(iii) Drafting criminal charges;

(iv) Prosecuting the accused in Court; and

(v) Attending to post trial task, such as the preparation of written submissions, until delivery of decision by the Court.

Please note that your appointment is made upon your confirmation that you are not in any way conflicted in this matter, bearing in mind the number of companies and individuals who are involved in these matters.

On behalf of the Government, I thank you for your generous offer to waive your fees, and to act on a "*pro bono*" basis.

The detailed terms and conditions of your appointment are set out in Appendix A, which forms an integral part of your engagement.

In order to enable you to discharge your duties efficiently and effectively, you will be allotted a room in Chambers, and the investigating Agencies and our prosecution team will assist you.

Yours sincerely;

… (sgd) …
Tommy Thomas
Public Prosecutor

Appendix A

Terms and conditions of engagement

1. All the duties and obligations imposed by law, whether under the Legal Profession Act 1976, its subsidiary legislation or other written law, and other common law and equity which apply to advocates and solicitors practicing in Malaysia continue to bind you while discharging your duties to the office of the Public Prosecutor ("PP").

2. In addition to such duties, you shall also assume all the duties and obligations imposed upon all Deputy Public Prosecutors employed on a permanent basis by the Attorney General's Chambers.

3. Foremost amongst the duties owed to our office are the duties of honesty, integrity, confidentiality and secrecy. Having regard to the sensitive and delicate nature of this engagement, these qualities are critical and cannot be over-emphasised. These duties continue to bind you even after the completion of all your tasks. They are therefore intended to be permanent.

4. As you are offering your services on a "*pro bono*" basis, PP has no objections to you continuing your private practice, save that in the event of priorities, clashes on dates, etc, priority must be given to this assignment. Further, all conflicts of interest, or potential conflict of interest must be scrupulously avoided until your engagement with us is determined.

5. You will have a free hand in undertaking your tasks, save that major decisions must be made in prior consultation with the PP.

6. You are entitled to seek assistance of lawyers from the Bar who enjoy your trust and confidence, save that prior written consent must be secured from the PP before any assistance is sought. Each of them will likewise be bound by these terms and conditions and must sign an acknowledgment or acceptance of these terms and conditions.

7. No press conference or media statement can be made without the prior approval of the PP.

8. All communications relating to your engagement shall comply with Government's policy on secure emails, servers and the like.

9. The PP shall be entitled to revoke your appointment at any time without assigning any reason. If you wish to resign, you are required to give the PP one month's notice in writing of such intention.

[23] Under s. 376(3) of the CPC, there are two requirements that must be fulfilled for the appointment of DPP/SDPP to be valid under the law. Firstly, such an appointment must be made by the proper appointing authority namely the AG/PP. Secondly, the person that is so appointed must be a "fit and proper persons" in the eyes or opinion of the appointing

authority (the AG/PP) at the time of such appointment was made. Since the second requirement under s. 376(3) of the CPC has been raised by the applicants under a separate heading, then the court will be dealing with that issue later.

[24] Back to the issue on point, the LOA showed that the appointment of GSR as a SDPP was made by the AG who, by virtue of under s. 376(1) of the CPC is the PP. Section 376(1) states:

> 376(1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

[25] Pursuant to s. 376(3), the PP is vested with the power to appoint a DPP and he may designate any of such DPP as a SDPP. Section 376(3) reads:

> The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors.

[26] Further, s. 376(4) states that the powers exercisable by the PP in sub-s. 376(3) CPC shall be exercised by him personally.

[27] After careful reading of the LOA and the said provisions, this court disagrees with the applicants' contentions. Section 376(3) of the CPC is very clear and unambiguous pertaining to the power of the AG/PP to appoint "fit and proper persons" to be DPP. The court agrees with the respondents' counsel submission that there is nothing in s. 376(3) of the CPC that provides that "fit and proper persons" to be DPP must come from the judicial and legal services. There is no such requirement or for it to be categorised as "primarily meant for public servants". If the alleged contention is true, then the Parliament would have included such proviso in s. 376(3) of the CPC as it will give a great impact to the AG/PP's power. Therefore, for the applicants to make such interpretation will disregard the true intention of the Parliament. Furthermore, s. 376(4) of the CPC provides that the rights and powers vested in or exercisable by the AG/PP by ss. 376(3) and 68(2) of the CPC shall be exercisable by the AG/PP personally. In this case, the AG/PP himself appointed GSR as a SDPP in the said LOA. Hence, the AG/PP has the sole discretion in appointing GSR as SDPP. The same view was taken by the Court of Appeal in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (*supra*), at para. 49 where the Court of Appeal stated as follows:

The PP has a discretion to appoint fit and proper persons to do the job in *Dato' Seri Anwar Ibrahim v. PP* [2014] 4 MLRA 420 at p. 421, it was held by this Court as follows:

> (3) The prosecutorial discretion to regulate the conduct of prosecution is the constitutional prerogative of the Public Prosecutor. The appointment of Shafee was at the sole discretion of the Public Prosecutor and no other body including the Bar Council could usurp that prerogative vested in the Public Prosecutor.

[28] It is important to note that the appointment of TS Shafee as DPP at the appeal stage in *PP v. Dato' Sri Anwar Ibrahim* [2014] 1 CLJ 354 was also made under s. 376(3) of the CPC. The Court of Appeal in that case held that TS Shafee's appointment was made under s. 376(3) of the CPC and, as a DPP, he may exercise all or any of the rights and powers vested under the law except those which had been specifically reserved for the PP. Thus, the applicants cannot now claim that s. 376(3) of the CPC is only meant for the appointment of judicial and legal services officers as DPP/SDPP. Consequently, the court is of the opinion that the applicants cannot now blow hot and cold and took a different position pertaining this issue.

[29] The court also agrees with the respondents' position that GSR's appointment under s. 376(3) of the CPC need not to be gazetted in the Federal *Gazette*. There is no statutory requirement imposed under s. 376(3) of the CPC for the appointment made thereunder be gazetted in the Federal *Gazette*. Further, TS Shafee never rebutted the fact raised by the respondents that his previous appointment as DPP in *Dato' Sri Anwar Ibrahim*'s case (*supra*) also has not been gazetted in the Federal *Gazette*. Further, there is no requirement for the appointment made under s. 376(3) of the CPC must be made in writing. Therefore, it is not the court's duty to insert these requirements where in fact the said provision did not impose such requirements. It is not the court's function to make law or rules. This court refers to the Court of Appeal's decision in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* at paras. 46 and 47 whereby the Court of Appeal has stated as follows:

> … Any appointment by the PP under section 376(3) CPC is not contingent upon such appointment being gazetted in the Federal *Gazette*. Therefore, it cannot be said that without the gazette the appointment of GSR is a nullity, void and of no effect …
>
> Hence we do not see the basis of the application for the production of the said LOA. Section 376(3) of the CPC does not require that the appointment to be made in writing. Thus, in the absence of the requirement of the appointment to be made in writing, it is a matter of course that the section does not provide for the LOA to be produced upon demand. It is not for the Courts to read and impose procedural

requirements into the provisions to rule a non-compliance. This is reading something into the provision which is not there in the first place. The section is clear and unambiguous. The Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 has stated that:

> … it is not for the Courts to create procedural requirements because it is not the function of the Courts to make law or rules. If there is no such procedural requirements then there cannot be non-compliance thereof. Only if there is that, there can be non-compliance thereof and only then the Courts should consider whether, on the facts, there has been non-compliance.

[30] Similarly, s. 376(3) of the CPC does not impose any condition for the appointment of a SDPP to be on a full-time or part-time basis. Moreover, s. 379 of the CPC talks about the employment of an advocate on behalf of the Government to conduct any criminal prosecution or inquiry, or to appear on any criminal appeal or on point of law reserved on behalf of the AG/PP. The advocate who conducting such prosecution or inquiry "shall be deemed to be a public servant". On the other hand, GSR was appointed as a SDPP by virtue of s. 376(3) of the CPC and not just being "employed" *per se*.

[31] As such, the court is of the considered opinion that the AG/PP has made the appointment of GSR as a SDPP under the statutory powers conferred on him. Further, the court agrees with the respondents' submission and it should be stressed here that the Government, like any private party, can choose and appoint or authorise any advocate to appear on their behalf in any court of law (see *R Balakrishna Pillai v. State of Kerala* 1999 Cri LJ 1286). It is not open to an accused in the case to suggest to the Government that it should not appoint or authorise an advocate to act on its behalf when the intention of the appointing authority is clear and the language of s. 376(3) of the CPC is broad and permissive of the appointment of GSR as a SDPP.

Fit And Proper Persons

[32] Based on *Stroud's Judicial Dictionary of Words and Phrases*, 11th edn, the phrase of "fit and proper person" is defined as follows:

> This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or para phrase and takes its color from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever is that the applicant seeks permission to do.

[33] Under s. 376(4) of the CPC as stated above, the AG/PP has the rights and powers personally in determining a "fit and proper persons" to be DPP. The term "fit and proper persons" under s. 376(3) of the CPC should not be read in isolation without cross-referring to s. 376(4) of the CPC. When both

provisions read together, it connote that only the AG/PP can determine who falls under the category of "fit and proper persons" upon his personal consideration and it is not the court's duty to do so.

[34] In these present cases, the AG/PP was satisfied that GSR is a "fit and proper person" within the meaning of s. 376(3) of the CPC at the time GSR was appointed as a SDPP. The AG/PP has affirmed in his affidavit dated 2 November 2019 at paras. 21 to 23 and said this in *verbatim*:

> [21] Having regard to Datuk Seri Gopal Sri Ram's unrivalled experience, first as a criminal practitioner of the highest standards (indeed, in the first few years of his practice, he appeared in 1979 in the nation's most celebrated trail, *viz. PP v. Harun Idris*), his direct appointment to the Court of Appeal in 1994, his retirement as a Justice of the Federal Court in 2001, and his return to active practice in the Bar is unprecedented in Malaysia. For the past 5 years, he is probably the most sought after barrister in our courts in all branched of the law.
>
> [22] Accordingly, it was clear to me that an experienced barrister be appointed to lead the prosecution against the Applicant, who is well versed and familiar in numerous branches of private and public law, particularly the technicalities of corporate, commercial, banking, finance, contracts, property, trusts, and criminal laws. In my mind, Datuk Seri Gopal Sri Ram is a versatile and all round barrister who has the sufficient expertise and experience to lead the prosecution team.
>
> [23] I was therefore satisfied that Datuk Seri Gopal Sri ram is a "fit and proper person" within the meaning of section 376(3) of the CPC when he was appointed as a Senior Deputy Public Prosecutor. I remained that view.

[35] With regard to the issues on bias, conflict of interest and unfitness as alleged by the applicants against GSR's appointment as a SDPP, notwithstanding the applicant's counsels brief reply in Case 377 which was tendered in this court admitting that the grounds of bias etc, are not the grounds canvassed herein to challenge the validity of the appointment, the court would like to put it on record that the same issues has been dealt with at the High Court as well as the Court of Appeal in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* where the Court of Appeal has made its finding as follows:

(i) GSR Is Bias (at paras. 101 to 102):

> [101] There is nothing before the court to show that there is a real danger of bias by GSR if he continues to act as prosecutor in this case. What constitutes biasness has been explained by the Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2002] 1 MLJ 321 at page 324 where the Court laid down the test to determine the danger of biasness:

> In England, the Courts applied the real danger of bias test in a criminal case. In *R v. Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicious test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (at p 679): [Having] ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favor, or disfavor, the case of a party to the issue under consideration?

[102] Applying the principles as enunciated in *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* (*supra*), after having regard to the facts, what is alleged are mere general suspicions and not based on specific facts. To disqualify a prosecutor, the burden is on the appellant as the applicant, to show cogent evidence and with certainty of such biasness and not mere bare allegations. This Court in *Dato' Seri Anwar Ibrahim v. PP* [2014] 3 MLJ 882 at page 887 emphasized the fact that the allegations of unethical conduct of a counsel must be specific and precise. There must be a positive violation of one or more rules of etiquette. Further it was also held by this Court that the Courts should be slow in making an order of disqualification unless absolutely necessary and for good reasons. The Federal Court in *Maleb Su v. PP* [1984] 2 CLJ (Rep) 232 also held that if bias is alleged, there must be proved a real likelihood of bias and that reasonable suspicion or bare allegations are insufficient.

(ii) GSR Is Not A Fit And Proper Person (at paras. 116 to 117):

[116] We are of the view that, whatever that had happened, it has been never shown that GSR had been found to be guilty of perjury or any misconduct by any forum. In *Dato' Seri Anwar Ibrahim v. PP* [2014] MLJU 1876, Tan Sri Muhammad Shafee has been found to have breached the Legal Profession Publicity Rules 2001 and that his appeal to the High Court was dismissed. Counsel for the applicant submitted that since Tan Sri Muhammad Shafee has been found guilty of misconduct under s. 94(3)(k) of the Legal Profession Act 1976, this made him liable to be struck off the Rolls under section 94(2) of the same. Therefore Tan Sri Muhammad Shafee is not a fit and proper person to be appointed as a DPP. Counsel for the applicant urged the Court to exercise its inherent jurisdiction to disqualify Tan Sri Muhammad Shafee from prosecuting the appeal. There this Court has held that the fact that the Bar Disciplinary Committee has deemed it fit not to strike out Tan Sri Muhammad Shafee off the Rolls, showed that Tan Sri Shafee is a fit and proper person to act as a DPP. What more in the case of GSR, there has never been any finding of guilt or offence committed, how could his case be any worst than Tan Sri Muhammad Shafee's situation.

[117] We therefore found that the learned High Court Judge did not err when he held that the allegations of perjury are mere allegations unsupported by any evidence or material as they have not been proven in any court of law.

(iii) GSR Is In Conflict Of Interest (at paras. 73 to 77):

> [73] We do not see how the above statement can amount to GSR being involved in the investigations of the cases that he is to prosecute. Investigative powers are vested with the relevant agencies, e.g. the police (PDRM) for offences under the Penal Code, the MACC for offences under the MACC Act 2009 and the Securities Commission for offences under the Securities Commission Act 1993. However, when the investigation process are completed, the IPs will be submitted to the DPPs to charge if there is sufficient evidence to formulate a charge. There has been occasion that the DPPs will instruct the investigation officer to do further minor investigations, usually to clarify matters. But that does not amount to the DPPs getting involved in the investigation on the ground or investigating the case itself. This role is only to ensure that the investigation is carried out in a fair manner and without fear and favor and to ensure that any criminal proceeding is only to be instituted against any person where investigation into the offences has been completed, but never to usurp the powers of the investigating agency.
>
> [74] Apart from the bare assertion by the appellant, there is no material placed before the court to show that GSR was involved in the investigations. GSR had denied the allegations by way of affidavit and he denied categorically that he had any hand in directing or supervising the investigating process. He stated that he has never at any time exceeded his role as a prosecutor.
>
> [75] There is no cogent facts to suggest that GSR was in any way involved in the recording of witness statements from the witnesses or the appellant. In fact the learned Judge found that the reinvestigation process into the 1MDB cases started after the previous AG decided to close the investigations and it started post 14th General Elections in May 2018. GSR was only appointed on 31.8.2018.
>
> [76] The interview and the press release by the AG are testimony as to this, i.e. that GSR, like any other DPPs are entitled to supervise and oversee any investigation to a particular case, but not to investigate the case himself. Hence the words in the interview "Sri Ram was involved in the final stages of investigations".
>
> [77] Therefore, in the absence of any material facts to support the contention that GSR was involved in the investigations, such contention against the appellant is unsubstantiated.

[36] The role of PP has been elaborated in the case of *Bunya Jalong v. PP* [2015] 5 CLJ 893; [2015] 5 AMR 1, where the Court of Appeal held as follows:

The role of the Public Prosecutor is quasi-judicial. It is to:

(a) review the evidence in the investigation papers;

(b) determine if the evidence in the investigation papers proves beyond reasonable doubt that an offence had been committed; and

(c) authorise the charges upon which the accused is to be charged and punished.

This *quasi*-judicial function is essential, because a decision to prosecute necessitates the accused to incur time and legal expense to defend himself, but for which there is no provision that he can recover costs if he is acquitted. For this reason, and to ensure there can be no doubt the decision was to prosecute and not persecute, there is the responsibility for the Public Prosecutor to be satisfied that there is an offence according to law and that the investigation papers contain proof beyond reasonable doubt. The notion of "if in doubt, prosecute and leave it to the court" is not only abandonment of that quasi-judicial function in the exercise of the absolute discretion to prosecute but also exposes prosecution to falling conviction rates. If the Public Prosecutor itself is in doubt, what court could conceivably find an accused, defended by counsel, guilty?

[37] Since GSR's appointment herein was made under s. 376(3) of the CPC and by the appointment, GSR is the all intents and purposes as a SDPP. As a SDPP, he may exercise all and any of the rights and powers vested under the law except those which has been specifically reserved for the AG/PP.

The Usage Of Affidavits Filed In Permohonan Jenayah No: WA-44-108-06-2020 In These Present Proceedings

[38] At the eleventh hour of these proceedings, the applicants' counsels had moved this court to use the affidavits affirmed by Tan Sri Mohamed Apandi Ali (hereinafter referred as "TSA") as well as GSR which was filed in the criminal court under Permohonan Jenayah No: WA-44-108-06-2020 by filing multiple notices of intention for the purpose to show that GSR is not a fit and proper person, a person which is bias, a person who prosecutes on political prosecution and a person who is full of conflict of interest. On this matter, the court agrees with the respondents' submission that the fact that the applicants have filed a second disqualifying motion in the criminal court to disqualify GSR shows that these issues should be argued and decided there. To allow the said affidavits to be adduced in these judicial review applications will carry the hallmarks of all abuse because the applicants are re-litigating the issues for which the applicants have raised it there. The issues here should only be confined to the appointment under s. 376 of the CPC. The re-agitation of these issues thus constitutes an abuse.

[39] The court also would like to emphasise that although those affidavits have been referred to in this court, it is not the pleaded issues to be heard and decided here. Bear in mind that, the applicants pleaded case here is whether the appointment should be under s. 376(3) or s. 379 of the CPC or whether GSR can be a part-time or full-time SDPP.

[40] To conclude, in these present cases, it is clear that the AG/PP had made a careful consideration before appointing GSR as a SDPP to spearhead the prosecution relating to 1MDB's scandal based on GSR's background and vast experience in legal field. Thus, based on what have been discussed above, the court is of the opinion that the AG/PP has made up his mind that GSR is a "fit and proper person" to be appointed as a SDPP to lead the prosecution relating to the 1MDB's scandal at that material time. As far as the allegations raised in the affidavits filed in the criminal court is concerned, this court is of the view that such allegations were never presented nor surfaced prior to the appointment of GSR as a SDPP by the AG/PP. Further, the court is of the opinion that such allegations remain as allegations in the said affidavits unless and until the deponent is called to testify and prove such allegations before the court.

Conclusion

[41] The AG/PP's power under s. 376(3) of the CPC is wide but not unlimited. So long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the objective of the statute. Otherwise, he had a complete discretion to appoint fit and proper persons to be DPP.

[42] Based on the facts of the case, there is no evidence before this court to prove that the AG/PP had misdirected himself in law in the appointment of GSR under s. 376(3) of the CPC nor the decision defies the objective of the statute.

[43] Therefore, it is the considered view of this court that the appointment of GSR as a SDPP pursuant to s. 376(3) of the CPC by the AG/PP is legal and valid.

[44] The AG/PP has not acted outside his constitutional or statutory powers and therefore is not a nullity, void and or of no effect. Accordingly, the court dismissed the applicants' applications in both cases with costs of RM10,000 for each case subject allocator fees.